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No. 91-1324

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

CONSOL PENNSYLVANIA COAL COMPANY, *et al.*,

Petitioners,

vs.

JAMES E. HUGHES, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did not respondents waive their argument concerning the rules of *Haslip*[1] and their due process arguments concerning the award of punitive damages, when they failed to raise seasonably the issue in the trial court?.

2. Assuming *arguendo,* there has been no waiver of the constitutional due process — the vagueness issue — then the requirements in *Haslip* have been satisfied by (a) the specific criteria set forth in the Pennsylvania Standard Suggested Jury Instructions; (b) the post trial review of the punitive damage award available by the district court (not pursued by petitioners); and (c) the appellate review by the Third Circuit (unsuccessfully pursued by petitioners).

3. Did not the Third Circuit correctly decide that the trial court abused its discretion in ordering a new trial on damages, when the district court failed to apply the correct Pennsylvania law on damages?

4. Did not the first jury make a specific finding that petitioners' conduct was outrageous?

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1. *Pacific Mutual Life Insurance Company v. Haslip,* 111 S. Ct. 1032 (1991).

PARTIES TO THE PROCEEDINGS

The petitioners are: Consol Pennsylvania Coal Company; Greenon Coal Company (formerly called Rheinbraun U.S. Corporation); the Monongahela Railway Company; Consolidation Coal Company; Consol Land Development Company; Maria Theresia Bergbaugesellschaft mbH; and Rheinbraun A.G.

Other petitioners are: William Reese; David Boggs; Ewing Pollock; Pollock, Pollock and Thomas; The Upshur Agency, Inc.

The respondents are: James E. Hughes; Linda L. Hughes; Dorothy Loughman; Paul H. Kent; Mabel Kent; James C. McIntyre; Glenna McIntyre; Larry Levine; Dan Levine; Morris Levine; Edward Levine; Morris Levine Enterprises, Inc.; Levine Iron & Metal Inc.; John W. Yesenosky Jr.; Linda M. Yesenosky; Thomas J. Allen and Estate of John T. Throckmorton; Mark E. Headlee and Charlotte B. Headlee.

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RESPONDENTS' BRIEF IN OPPOSITION

Petitioners omit and distort facts of this case and omit the crucial facts. A review of the record below shows that petitioners' petition is a tardy attempt to raise a due process argument that they have waived. The respondents to this petition respectfully pray that the petition for a writ of certiorari be denied.

STATEMENT OF THE CASE

A. Introduction

These cases present no issue suitable for review by this Court because the petitioners never raised the issue of unconstitutional vagueness in the punitive damages standards in a timely basis before the trial court. The first time that this issue was raised was in defendant's motion for judgment notwithstanding verdict after the second trial of this case. The Honorable D. Brooks Smith, trial judge, found that they had failed to preserve this issue. In *Browning Ferris,*[2] this Supreme Court refused to consider a tardy, last-gasp argument supposedly predicated on the Fourteenth Amendment to the United States Constitution. Petitioners now at this late date attempt to raise this same due process argument which they have waived.

In actuality, the petitioners are not seeking review on a legal issue. Rather they wish to reargue facts to this Court after losing two jury trials and their argument before the Third Circuit. After eleven years of injustice these petitioners want to deny, unconstitutionally, the respondents' Seventh Amendment rights given to them by the jury in the first trial.

They falsely state that the second jury heard the same evidence as the first jury. This is incorrect, even their own counsel judicially admits that the second jury could not determine punitive damages because they were not the trier of fact with respect to the fraud and punitive damages builds on fraud (TR2, 3158).[3]

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2. TR1 denotes trial record, first trial; TR2 denotes trial record, second trial.

3. *Browning-Ferris v. Kelco Disposal,* 492 U.S. 257, 106 L. Ed 2d 219, 109 S. Ct. 2909 (1989).

The petition must be denied because the issues now before the Supreme Court were waived below. Moreover, the case is unimportant to the administration of federal justice because disposition of the petition turns on unique facts, peculiar to the procedural errors committed by petitioners and to state law.

B. Facts

The petition omits and distorts inconvenient facts. In accordance with Sup. Ct. R. 15.1, the facts must be restated.

Petitioners' petition vastly understates the carefully planned, massive fraud perpetrated by Consol Pennsylvania Coal Company (Consol) and Rheinbraun U.S. (Rheinbraun),[4] a private business enterprise, in their use of the Monongahela Railway Company's (Mon Railway) power of eminent domain to be certain that a necessary right-of-way to their coal mine was obtained quickly and cheaply. The role of Consol in paying all the costs of acquisition of the land and the construction of the railroad was fraudulently kept from the respondent landowners. Petitioners omit the fact that in the first trial the issues of liability (*i.e.*, for fraud and RICO violations) as well as compensatory damages were tried to verdict. The second trial was a trial on damages only. The jury in the first case, after a two month trial and a view of the property involved in this action, laboriously answered consistently 539 written interrogatories contained in a 30 page verdict slip.[5] More fatal to petitioners' argument is the failure of petitioner to raise the issues presented in their petition until now.

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4. Also Greenon Coal Company, Consolidation Coal Company, Consol Land Development Company, Maria Theresia Bergbaugesellschaft MbH, and Rheinbraun, A.G.

5. Verdict Slip is docketed at No. 361-62 Feb. 24, 25, 1987.

Petitioners make no mention of the outrageous conduct they engaged in to obtain the respondents' and other landowners' properties.[6] In fact, this case involves a deliberate fraud perpetrated by petitioners against the respondent landowners.

Respondents established at trial that petitioners formed an enterprise to obtain coal from mines in Greene County, Pennsylvania. Ancillary to that purpose, through a pattern of racketeering, fraud and conspiracy, they acquired the land for a railroad track to one of the mines; land which petitioners still possess. To acquire the necessary land, petitioners chose Mr. Boggs and other members of the Upshur Agency to obtain these lands from the respondent landowners and other landowners.

Mr. Boggs told the Headlees that he represented the Mon Railway and they had the right to condemn the Headlee property and pay only $700 an acre (TR1, 21). He specifically said that they had the power to take at a certain price (TR1, 20). Mrs. Headlee testified that Boggs said that if the railroad condemned "that they could put the railroad tracks within ten feet of our home and did not have to fence it or worry about our children." (TR1, 27).

Mr. Wilson said much the same to the McIntyres. The McIntyres lived on the opposite side of the road from where the tracks had been designed to be, yet Mr. Wilson said the railroad could condemn their property. When Mrs. McIntyre asked why the railroad did not condemn Dr. Phillippi's property, which was in the path of the track, Mr. Reese replied, "Dr. Phillippi was much too powerful." He had too much money and he could tie the railroad up for three years, and it could not afford to wait (TR1, 201). The McIntyres, of course, knew what happened to

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6. *See* Petition of Certiorari ("Petition") at 4-7.

the Headlees, their friends and they agreed to sell their home in just one afternoon.

Mr. Boggs told the Yesenoskys that they did not have any lawful access to their property. He said that if they refused to sell, they would only get a couple of thousand dollars for their bottom ground. A standing train could block their access to the highway, leaving them trapped with their asthmatic child struggling to breath and needing hospital attention (TR1, 246).

Mr. Boggs began negotiations with Mr. Hughes by saying "I guess you are the one that is in trouble" (TR1, 238). He said that the railroad would condemn the Hughes if they did not accept his offer to buy, but peculiarly Consol, not the railroad, gave Hughes permission to strip the house after the sale was consummated.

Mr. Boggs told Dan Levine that "Consol was out, Monongahela and him were in and it was a whole new ball game" (TR1, 332). Boggs said, "We can condemn your property, and you'll get $1,200 an acre . . . ." (TR1, 398) and "at one point, he stated that with their vast legal and financial resources," that they could "crush" the Levines (TR1, 399). Larry Levine heard the same things (TR1, 451, 462).

Mr. Boggs carried on with Paul Kent in the same way. Boggs told Paul Kent that if their tool sheds were not moved out of the road "they would put a bulldozer up again[st] them and push them over." (TR1, 492). Mr. Boggs told the Kent's lawyer, "I'm getting tired of everybody accusing me of representing Consolidation Coal Co." (TR1, 639). Boggs said he represented the railroad only.

Mr. Boggs told Mrs. Loughman that she would be condemned and get only $1,000 an acre (TR1, 559). Mr. Keel, of Consol,

told Mrs. Closser, another landowner on the route who had discovered Consol's role, that they were considering moving state Route 18 and putting the railroad on Route 18. Boggs told Mrs. Huffman a non-party witness that Consol was not involved and that if she did not sign the option agreement, "the wheels would start rolling . . . and that they would start swinging the hammer." (TR1, 2335).

Petitioners fail to note the special set of maps they offered to actively conceal the identities of the true parties in interest (TR1, 2308-2311, TR2, Ex. 251(5), Ex. 251(32)); they fail to mention the misstatements as to added consideration (TR1, Ex. 45, Ex. 47, Ex. 56, Ex. 57, Ex. 67, Ex. 68, Ex. 70, Ex. 71); the special checks that elaborately misstate the agency arrangements (TR1, Ex. 128); the specially prepared receipts that give credence to the promises of tax free damages (TR1, Ex. 47, 333, Ex. 68, Ex. 72); the options with words blackened out (TR1, Ex. 50); and the ghost written letters for mailing to landowners on the railroad's stationery (TR1, Ex. 20).

As a result of this fraud, respondent landowners were not paid the true, fair and correct market value for their property. Only three landowners were knowledgeable as to the true, fair and correct market value for their property and dealt at arm's length: John Culp, Sarah Closser and Grover Phillippi. Culp, a professional land speculator, purchased land in the right-of-way because it was right-of-way property. Grover Phillippi was represented by an assistant county solicitor who specializes in condemnation law, and Sarah Closser was represented by David Hook, a young lawyer who discovered by accident the massive fraud of defendants. Culp received a million dollars for thirteen acres; Phillippi received $600,000 for five acres and a $160,000 siding; and Closser received $470,000 for two acres.

The witnesses and parties appearing in this action did so at

great inconvenience and some personal risk. Many of the respondents are elderly. Mr. Kent is in his 80's, blind and infirm. Mrs. Huffman, a non-party witness to this trial, has a son who works for Consol at the coal mine in controversy. The Kents had their footbridge torn down after they filed suit. Petitioners threatened to put a highway near Mrs. Closser's home.

Respondents, of course, introduced much more evidence at trial. The evidence shows a history of overwhelming and unchecked corporate tyranny and oppression of individuals that merited punitive damages. Petitioners' motive for their outrageous conduct became clear at trial — the $3.9 billion expected in revenues on this mine project.

Two final misstatements in the petition for certiorari need to be addressed. Petitioners' statement that respondents refused a remittitur (Petition, p. 5) is totally false. The trial judge directed the parties "to seek an accommodation as to the damages to be remitted in each case", it was the petitioners that refused to make any offer to settle this case despite the verdict (Petition, A115-A116). Also, petitioners imply that the Honorable Hubert I. Teitelbaum granted a new trial on punitive damages. This is incorrect. Judge Teitelbaum gave respondents their choice of RICO damages or common law punitive damages at a post trial conference.

REASONS FOR DENYING THE WRIT

Summary of Argument

The petition should be denied. The punitive and compensatory damage issue in these consolidated cases were decided correctly. Petitioners waived their claim to any due process violation for the award of punitive damages or to any requirements set forth under Pennsylvania law for not providing the procedural

requirements as set forth in *Haslip*[7]. Petitioners failed utterly to comply with the Federal Rules of Civil Procedure, Rule 50 designed to preserve these issues for the appellate courts. Assuming *arguendo*, that the issue of vagueness was not waived, the requirements stated in *Haslip* were satisfied.

The issues presented by petitioners are matters of well established Pennsylvania state law and are of no interest in the over-all administration of federal justice because the viability of the petition turns on the unique procedural carelessness of petitioners in failing to preserve these issues and matters of Pennsylvania state law.

I.

Petitioners waived their argument concerning the rules of *Haslip* and their due process arguments concerning the award of punitive damages, when they failed to raise seasonably the issue in the trial court.

Petitioners have waived any due process issue that the laws of Pennsylvania provide insufficient guidelines to juries and lacks post award review in the awarding of punitive damages.

In the first trial no such issue was raised before the Honorable Hubert I. Teitelbaum. A search of the transcript and the motions of record reveals this. After the second trial of this case, which was solely limited to a determination of the quantity of damages to be awarded, the issue of vagueness was raised in petitioners' motion for judgment n.o.v. and new trial. As the Honorable D. Brooks Smith noted in his memorandum opinion, "We do not recollect defendants previously raising this objection, either in

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7. *Pacific Mutual Life Insurance Company v. Haslip*, 111 S. Ct. 1032 (1991).

formal motions or in the conference concerning the jury instructions." (Petition at A85).

Having failed to preserve the issue, petitioners may not pursue it before the Supreme Court. As this Court has indicated in *Browning-Ferris v. Kelco Disposal*, 492 U.S. 257, 106 L. Ed. 2d 219, 109 S. Ct. 2909 (1989), the Court will not "attempt to decide the question in the absence of a record on the due process point developed in the District Court and the Court of Appeals." *Browning-Ferris, supra*, 492 U.S. 257 at 277, n. 23, 106 L. Ed. 219 at 239. *Browning-Ferris* likewise concerned a request by a party who failed to preserve in the record below the due process issue. The petitioners' Fourteenth Amendment due process claim therefore is waived. To grant certiorari here especially after *Browning-Ferris* would encourage a proliferation of tardy, last-grasp constitutional arguments without providing the trial court any reasonable opportunity to correct its own errors. Not only would granting a certiorari here encourage such a squandering of judicial resources, but also it would preclude any meaningful opportunity for district courts to develop case law by considering such issues in the first instance and so deprive this Court of their salutary counsel.

II.

Assuming *arguendo*, there has been no waiver of the constitutional due process — the vagueness issue — then the requirements of *Haslip* have been satisfied by (a) specific criteria set forth in the Pennsylvania Standard Suggested Jury Instructions; (b) the post trial review of the punitive damage award available by the district court (not pursued by petitioners); and (c) the appellate review by the Third Circuit (unsuccessfully pursued by petitioners).

In the first trial, the Honorable Hubert I. Teitelbaum gave the Pennsylvania Standard Suggested Civil Jury Instructions

[Pa.S.S.J.I. 14.00 *et seq.* (Civ.)] on punitive damages. These instructions listed specific criteria to wit:

> (1) the character of the defendants' act;
>
> (2) the nature and extent of the harm to plaintiff caused or intended to be caused by defendants;
>
> (3) the wealth of defendant;
>
> (4) A relationship between punitive and compensatory damages.

(TR1, 2615-2617. *See* Petition at A127-129).

This jury instruction is the criteria outlined in the Restatement of Torts 2nd, § 908 *et seq.*[8] The petitioners never brought to the court's attention that they disagreed with the criteria set forth in the Restatement of Torts 2nd which has been adopted by the Pennsylvania state courts. Petitioners are asking this Court to rewrite the well established Restatement of Torts 2nd law on punitive damages. Clearly this instruction gives juries specific guidelines to follow.

The repeated extensive and outrageous conduct of petitioners and the Pennsylvania jury instruction gave a clear basis for punitive damages. The $5,500,000[9] amount for the punitive damage award

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8. *Chambers v. Montgomery*, 411 Pa. 339, 192 A.2d 355 (1963).

9. Petitioners' conduct was so oppressive the second jury *not* having heard the evidence on fraud and *not* having heard the overwhelming evidence of outrageous conduct still awarded over a half of a million dollars in punitive damages.

alongside of the $5,360,500 amount in compensatory damages was and is not shocking and clearly bears a relationship to the compensatory damage award[10] (Petition at A61-A62). The jury clearly had specific criteria which they followed in awarding punitive damages.

Moreover, post trial review by the trial judge was available to petitioners as well as appellate review. Here, petitioners never requested Judge Teitelbaum to scrutinize the punitive award. Clearly, petitioners were afforded procedural due process which they failed to request.

Petitioners argue that *Haslip* requires that Alabama standards for punitive damages be applied in Pennsylvania (*see* Petition at 14 and 15). This is not what *Haslip* requires. *Haslip* requires there be a reasonable set of criteria for a jury to reference and a reasonable post trial and appellate review process.[11]. This process was afforded to the petitioners. The jury hearing the evidence on liability in the first trial issued a reasonable punitive award to respondents, petitioners never requested the trial court to scrutinize this award.

Haslip does not require that the criteria used in Alabama be used nationwide, nor does it suggest the Supreme Court must review and correct the punitive standards used in each of our states, or provide fifty (50) separate analyses for punitive standards.

Just as the defendants in *Haslip* "had the benefit of the full panoply of Alabama's procedural protection" so did the petitioners

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10. These awards are the total amount of the damages awarded to the respondents for the nine properties involved.

11. *Haslip*, 111 S. Ct. at 1044-45.

have the protection of a similar jury instruction and they had available to them post-trial review.[12] Petitioners did not object to the jury instructions on the grounds that said instructions were not specific enough or that these instructions would not afford guidance to the jury. There were numerous specific findings of outrageous conduct by the jury in the first trial (Petition at A84). Petitioners could have sought review by the district court but they failed to do so (*see also*, Petition at A97-A100).

When petitioners eventually raised this issue the Honorable D. Brooks Smith found that petitioners had failed to preserve the due process issues on punitive damages (Petition at A85).

Because Pennsylvania has reasonable criteria, post trial review and appellate review for the award of punitive damages, petitioners have not been denied any due process, especially since they failed to preserve the due process issue.

III.

The Third Circuit correctly decided that the trial court abused its discretion in ordering a new trial on damages when the district court failed to apply the correct Pennsylvania law on damages.

The amount of compensatory damages in this case was determined by applying the law of Pennsylvania. Any review of the record reveals that the trial court adopted an erroneous premise in its decision to grant a new trial on damages. If a decision to award a new trial is inappropriate, the correct solution is to reinstate the first verdict even when an additional theory against a defendant might be retried. *Fassbinder v. Pennsylvania Railroad Co.*, 322 F.2d 859 (3rd Cir. 1963). The Third Circuit reviewed

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12. *Haslip*, 111 S. Ct. at 1046.

for an abuse of discretion and reversed the district court (Petition at A59). The Third Circuit correctly noted that under Pennsylvania law the issue was "whether the actual loss should be based on the properties use as agricultural lands or the *highest and best use* as railroad rights-of-way" (Petition at A59)." (emphasis added). Pennsylvania law provides that when a property owner faces condemnation he or she can show this property's special and potential use as a railroad right-of-way. *North Shore R.R. v. Pennsylvania Co.*, 251 Pa. 445, 96 A. 990 (1916); *Commonwealth Dept. of General Servs. v. Fake*, 45 Pa. Commw. 46, 405 A.2d 971 (1979). To prove highest and best use, a condemnee must show the land is adaptable to such use and a market need exists for such a use at the time of the condemnation. *Fake*, 45 Pa. Commw. at 50-51, 405 A.2d at 974. *Cf., United States v. 46,672.96 Acres of Land*, 521 F.2d 13, 15 (10th Cir. 1975).

Any review of the record points to a manifest abuse of discretion committed by the trial court when it granted a new trial as to damages. At the first trial of this case from each landowner there was testimony adduced as to the location of his land and its prior use. *See, e.g.* TR1, Ex. 137. There was testimony as to an abandoned railroad right-of-way across the property of some of the respondents (TR1, Ex. 39). There was evidence as to the need for a railroad corridor. There was testimony as to comparable sales, *i.e.*, to sales of property for right-of-way purposes in the vicinity of landowner's properties, and there was expert testimony from a licensed broker as to the value of landowner's property. By and large, the jury accepted the conclusions of the landowner's expert, Mr. Bodnar (Petition at A113). The Third Circuit correctly decided that the jury's verdict on Mr. Bodnar's findings should have been accepted by the trial court.

At the first trial, petitioners tried this case as though plaintiffs had only residential, agricultural or light industrial properties (TR1,

1766-1801). Their appraisers conceded that the comparable sales approach was the correct one. But their appraisers were unfamiliar with the properties and the area.[13] Although some evidence might have supported their position, it was rejected by the jury, and petitioners offered no alternative valuations for the property. The first jury in this case was not hoodwinked by a slick presentation. It went on a view to look at the property and the railroad.

The trial court made a basic error in applying incorrect historical use and values to respondents' property.[14] The trial court's invasion of the jury's province was premised on an error of the appropriate measure of damages, governed by Pennsylvania law. The Third Circuit reviewed this abuse of discretion, and applied the correct law on the measure of damages to wit, the highest and best use as a railroad right-of-way and reinstated the first jury's award.

It is well settled that once an expert is permitted to testify, his qualifications not being challenged, the credibility of his testimony is for the jury to determine. As noted by Judge Smith, "In these cases Plaintiffs presented expert testimony concerning the fair market value of their properties which would support the jury's verdict." (Petition at A77-A79). Judge Teitelbaum's invasion of the jury's decision on the credibility of Bodnar's testimony was clearly an abuse of discretion. This has long been

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13. For example, Mr. Fine who testified for Consol was unfamiliar with prices paid to many of the landowners (TR1, 1782-90, 1793-94). Even the court noted credibility problems with Mr. Fine's testimony (*see*, TR1, 1785-87).

14. Just as the announcement of the construction of Disney World changed the highest and best use of the swamps around Orlando, Florida into expensive commercial property, the announcement of the construction of the Baily Mine changed the highest and best use of the property to the only viable access route to the mine to industrial railroad right-of-way property.

the law. *See Lind v. Schenley Industries, Inc.*, 278 F.2d 79, 89 (3rd Cir.), *cert. denied*, 364 U.S. 835 (1960); *Bhaya v. Westinghouse Elec. Corp.*, 832 F.2d 258, 259 (3rd Cir.), *cert. denied*, 109 S. Ct. 782 (1989); *Bonjorno v. Kaiser Aluminum Chemical Corporation*, 752 F.2d 802 (3rd Cir. 1984), *cert. denied*, 477 U.S. 908 (1986).[15]

Petitioners, in their petition, inaccurately state there was no evidence that respondents would have demanded higher prices if they knew the truth (Petition at 9). This assertion is false. For example, Floyd King, attorney and negotiator for the Kents and John Throckmorton said if he knew the truth "It would have enhanced my bargaining position considerably." Numerous other plaintiffs indicated they would have asked higher sums if they knew the truth. But for the petitioners' fraud in misrepresenting the circumstances of the acquisition respondents would have demanded higher prices. The law does not speculate on what they might have asked, but gives them the *fair market value*. Here that value is as railroad right-of-way across unique property being acquired after the announcement and start of construction of a one hundred million dollar coal mine with billions of dollars of coal to be mined.

IV.

The first jury made a specific finding that petitioners' conduct was outrageous in the first trial.

Petitioners fail to advise this Court that the second trial in this case was a trial on damages only. There had already been a finding by the first jury who heard all the evidence and decided that there was in fact fraud and outrageous conduct committed

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15. Certification was denied on all of these cases.

by these defendant petitioners (Verdict Slip Docket at 361-2). The first jury heard all the evidence. As counsel for petitioners admitted and argued at the second trial as to the second jury:

> Mr. Katarincic: . . ."I want to really put on the record again, following this question from the jury, the fact that *this jury cannot determine punitive damages without having been the trier of fact with respect to the fraud* because punitive builds on fraud, ..."

(TR2, 3158) (emphasis added).

We agree the first jury was the only jury that could determine the punitive damages in this case. They heard the fraud and the outrageous conduct of these petitioners — their verdict should stand.

CONCLUSION

The writ should be denied. The decision by the Third Circuit was correct in deciding to reinstate the first jury's compensatory and punitive damage awards. The petition fails to present issues of the slighest general importance.

Respectfully submitted.

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